

CE

HAYES H. GABLE, III
Attorney at Law - SBN 60368
428 J Street, Suite 354
Sacramento, California 95814
Telephone: (916) 446-3331
Facsimile: (916)447-2988

THOMAS A. PURTELL
Attorney at Law - SBN 26606
430 Third Street
Woodland, CA 95695
Telephone: (530) 662-9140
Facsimile: (530) 662-3018

Attorneys for Defendant
MARCO ANTONIO TOPETE

FILED
YOLO SUPERIOR COURT

DEC 18 2009

By

C. Garrett
Deputy

YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff,

vs.

MARCO ANTONIO TOPETE,

Defendant(s).

Case no. CR08-3355

**SUPPLEMENTAL POINTS AND
AUTHORITIES IN SUPPORT OF
PRETRIAL DISCOVERY
COMPLIANCE MOTION**

Date: January 15, 2009
Time: 1:30 p.m.
Department: 6

Defendant, Marco Antonio Topete, submits the following supplemental points and authorities in support of his motion for his motion for pretrial discovery compliance.

No. 3¹ – In *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, the Third District Court of Appeal held that Penal Code sections 1054.1 and 1054.3 must be interpreted to require discovery of witnesses' oral statements. As the court stated,

¹ Item numbers are those that appear in the discovery compliance motion filed on October 27, 2009.

1 “Interpreting section 1054.3, and concomitantly section 1054.1, to include witnesses’
2 oral statements contained in oral reports to counsel will help ensure that both parties
3 receive the maximum possible amount of information with which to prepare their
4 cases, which in turn facilitates the ascertainment of the truth at trial. This objective is
5 undermined if oral statements reported to counsel are excluded from the statute’s
disclosure requirement. Roland does not proffer any cogent reasons why the search
for the truth should be limited to written, videotaped, or tape-recorded statements of
intended witnesses.
(*Id.* at p. 165, fn. omitted.)

6 The court went on to say, “[t]here is no logical reason to require both the prosecutor and
7 defense counsel to disclose to each other all of the written statements and reports of relevant oral
8 statements of witnesses, other than the defendant, whom they intend to call at trial, but not require
9 them to disclose to each other oral statements such witnesses made directly to counsel.” (*Id.* at p.
10 167.)

11 Accordingly, the defense request for discovery of all information orally related to law
12 enforcement persons, or related orally to the district attorney and his agents by potential witnesses
13 concerning or relating to, the prosecution of the pending charges, must be granted under the authority
14 of *Roland*.

15 **Nos. 5 & 7** – In No. 5, the defense is merely seeking notification of the existence, *not* the
16 identity, of any informant used in connection with the investigation or prosecution of this action.
17 Under Penal Code section 1054.1 (e), the prosecution is required to disclose any exculpatory
18 evidence. This duty is imposed under the federal due process clause. (See *Brady v. Maryland*
19 (1963) 373 U.S. 83; *Kyles v. Whitley* (1995) 514 U.S. 419, 432 [prosecutors have an “affirmative
20 duty to disclose evidence favorable to the defense”].) Impeachment evidence is exculpatory
21 evidence within the meaning of *Brady*. (*Giglio v. United States* (1972) 405 U.S. 150, 154; see also
22 *United States v. Bagley* (1985) 473 U.S. 667, 676.) By requesting notification of the existence of
23 any informant, the defendant is then put on notice that he must move the court for a determination as
24 to the materiality of that informant.

25 The materials requested in No. 7, i.e., reports and other information concerning the substance
26 of the information supplied by the informant, contemplates that the prosecution would claim a
27 privilege, thus putting into play the procedure for disclosure of informants set forth in Evidence
28 Code section 1042, including the in camera review of relevant materials by the court.

1 Thus, the request set forth in No. 5 is a prerequisite to further litigation pertaining to the
2 identity of any confidential informant. It is fully anticipated that the request contained in No. 7 will
3 trigger the invocation of a claim of privilege under Evidence Code section 1041.

4 **No. 9** – The request is for notification of the destruction of raw notes of any law enforcement
5 officer concerning a statement taken from the defendant relating to this case. The prosecution is
6 required to disclose all statements of the defendant under Penal Code section 1054.1(b). In
7 *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480, the court held that raw notes of interviews
8 of all witnesses were discoverable under the discovery statutes, regardless of whether they were
9 used to produce a formal statement. (*Id.* at p. 488.) Defendant hereby amends his request to include
10 a request for notification of the destruction of raw notes of any law enforcement officer concerning a
11 statement taken from any witness relating to this case. The reason for this request is apparent from a
12 consideration of the holding in *People v. Coles* (2005) 134 Cal.App.4th 1049.

13 In *Coles*, an officer had interviewed two witnesses, and took notes on a small pad while
14 doing so. Two or three hours later, she used the information from those notes to refresh her
15 recollection when she wrote her report and summarized what the witnesses had told her. It was
16 standard procedure to destroy notes after preparing a written report. The officer's report encompassed
17 everything that was in her notes. Another officer spoke to one of the witnesses, and put the noted
18 information in his report. Everything in the notes was included in his report. The general custom and
19 practice, as well as the particular procedures followed by the two officers was inquired into during
20 both direct and cross examination. The appellate court found that the uncontradicted testimony
21 established that the the destruction was done in good faith, and the investigating officers' destruction
22 of the notes after preparing reports, in accordance with departmental policy, did not violate Pen.
23 Code, §§ 1054, 1054.1, subd. (f). (*Id.* at p. 1055.) However, to make that determination, a trial court
24 must make findings on three points: (1) whether the notes were made for the purpose of transferring
25 the data, (2) whether the agent acted in good faith in destroying the notes, and (3) whether the agent
26 acted in accordance with the normal procedure of the governmental unit in so destroying the notes.
27 (*Id.* at p. 1054, citing *People v. Trice* (1985) 165 Cal.App.3d 256, 264, internal quotation marks
28 omitted.)

1 Once again, the request for notification of the destruction of raw notes is a prelude to a
2 potential pretrial motion. Clearly, the defendant is entitled to this information to enable him to assert
3 his rights under the discovery statutes as well as the due process clause of the Fourteenth
4 Amendment of the United States Constitution.

5 **No. 10** – The defendant has requested all documents, reports, publications and photographs
6 which the gang officer has referred to, considered or relied upon in arriving at his opinion that the
7 Norteños is a criminal street gang that has as one of its primary activities the commission of the acts
8 enumerated in Penal Code §186.22.

9 The court stated during the hearing on November 25th that its ruling, subject to being
10 convinced otherwise, was “to deny the request, except as required by PC 1054.1(f). “ (RT 310.) The
11 court relied on language contained in *1-3 California Criminal Discovery*, §3:13.¹ That section, in
12 turn, relied on *People v. Roberts* (1992) 2 Cal.4th 271, which held that the trial court did not err in
13 denying a defense request for production of “the materials on which the officers relied to interpret
14 the BGF oath and rules.” (*Id.* at p. 299.) *Roberts* relied upon *Pennsylvania v. Richie* (1987) 480
15 U.S. 39, 52-53, in holding that the confrontation clause of the Sixth Amendment did not entitle the
16 defendant to the requested discovery.² (*Id.* at p. 286.) However, the *Pennsylvania v. Richie* court
17 went on to say that they were not suggesting that a criminal defendant did not have protections for
18 pretrial discovery. Indeed, while the Confrontation Clause only protects a defendant’s trial rights,
19 the Due Process Clause of the Fourteenth Amendment protects the defendant’s right to pretrial
20 discovery. (*Pennsylvania v. Richie, supra*, 480 U.S. at pp. 56-57.) Penal Code section 1054,

21
22 ¹ *California Criminal Discovery* is a publication written by a retired prosecutor and and a defense attorney. While
23 such a dichotomy might suggest balance in the presentation of the subject matter, the authors’ preface to the work suggests
24 an ideology of their own. The authors state: “We recognize that some of the conclusions we espouse in this Fourth Edition
25 will not be welcomed by some courts or some counsel. We know that points of view that are opposed to ours are sometimes
26 strongly held. And we realize that the courts might ultimately reject the analyses we advance in this Fourth Edition. As authors
27 we have tried to set aside our normal roles as prosecution and defense advocates in order to reach conclusions that we feel
28 are correct, even though these conclusions might be unpopular with our colleagues on both sides in criminal cases.” (1
Cal.Crim.Disco., Authors’ Preface.)

² The authors of *Californai Criminal Discovery* erroneously state that the *Roberts* court relied on *Commissioner*
v. Groetzinger (1987) 480 U.S. 23. *Groetzinger* was a tax case that had nothing to do with pretrial discovery in a criminal
case.

1 subdivision (e) expressly states that “no discovery shall occur in criminal cases except as provided
2 by this chapter, other express statutory provisions, *or as mandated by the Constitution of the United*
3 *States.*” (Emphasis added.)

4 *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, is the seminal case interpreting the
5 statutory discovery scheme. *Izazaga* also acknowledged that the defense is entitled to a broad range
6 of discovery not specifically spelled out in the statutory scheme.

7 In order that a defendant may secure a fair trial as required by the due process clause,
8 “the prosecution has a duty to disclose all substantial material evidence favorable to
9 the accused [Citations.] That duty exists regardless of whether there has been a
request for such evidence [citation.], and irrespective of whether the suppression was
intentional or inadvertent. [Citations omitted.]”

10 The prosecutor’s duties of disclosure under the due process clause are *wholly*
11 *independent* of any statutory scheme of reciprocal discovery. The due process
12 requirements are self-executing and need no statutory support to be effective. Such
13 obligations exist whether or not the state has adopted a reciprocal discovery statute.
Furthermore, if a statutory discovery scheme exists, these due process requirements
operate outside such a scheme. The prosecutor is obligated to disclose such evidence
voluntarily, whether or not the defendant makes a request for discovery.
(*Id.* at p. 378, emphasis in original.)

14
15 Evidence Code section 721 provides: “(a) Subject to subdivision (b), a witness
16 testifying as an expert may be cross-examined to the same extent as any other witness and, in
17 addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which
18 his or her expert testimony relates, and (3) *the matter upon which his or her opinion is based and*
19 *reasons for his or her opinion.*” (Emphasis added.) Obviously, the defense cannot cross-examine
20 the expert on the “matter upon which his . . . opinion is based,” if the defense cannot examine such
21 “matter.” If the “matter” upon which the expert’s opinion is based is kept exclusively by an
22 “investigating agency,” then section 1054.1 is the only vehicle available to the defense to procure
23 such “matter.”

24 In *Woods v. Superior Court* (1994) 25 Cal.App.4th 178, the court held that a psychologist
25 retained and offered by the defense to testify that defendant did not possess the character traits
26 necessary to commit the crime must turn over before trial “the results of physical or mental
27 examinations” including defendant’s responses to standardized tests where “the psychologist relied
28 on the responses in reaching his conclusions.” (*Id.*, at p. 183.) In support of its holding, the court

1 stated:

2 “Our interpretation is consistent with the professed intent behind Proposition 115.
3 The law was designed to ‘restore balance to our criminal justice system (and) create a
4 system in which justice is swift and fair.’ [Citations omitted.] As we have said in the
5 past: ‘the purpose of section 1054 et seq. is to promote ascertainment of truth by
6 liberal discovery rules which allow parties to obtain information in order to prepare
7 their cases and reduce the chance of surprise at trial. [Citation.] Reciprocal discovery
8 is intended to protect the public interest in a full and truthful disclosure of critical
9 facts, to promote the People’s interest in preventing a last minute defense, and to
10 reduce the risk of judgments based on incomplete testimony. [Citation.]’ [Citations
11 omitted.] Requiring pretrial disclosure of the raw results of standardized
12 psychological and intelligence tests administered and relied upon by an expert the
13 defense intends to call at trial allows access to information necessary to prepare the
14 case, reduces the chance of surprise at trial, furthers the attainment of truth and
15 lessens the risk of judgment based on incomplete testimony. In short, it advances the
16 statutory goals.

17 (*Id.*, at pp. 184-185.)

18 The situation here is analogous. The prosecutor is intending to introduce expert testimony to
19 prove that the Norteños is a criminal street gang and the crime was committed to further the
20 overarching criminal purpose of that gang. The expert’s opinion is based, in part, on a review of
21 police reports, field identification cards and other documentation. Pretrial disclosure of this “raw
22 data” which is “relied upon by an expert . . . allows access to information necessary to prepare the
23 case, reduces the chance of surprise at trial, furthers the attainment of truth and lessens the risk of
24 judgment based on incomplete testimony.” (*Ibid.*)

25 This court’s reliance on *People v. Roberts, supra*, 2 Cal.4th 271, as authority for its position
26 that the requested materials should not be turned over to the defense, is misplaced. In *Roberts*, in
27 order to counter prosecution evidence of gang membership and activity, “[d]efendant requested
28 discovery of all documents and other sources from which the witnesses had derived their knowledge,
even if complying would mean producing everything one witness had seen for seven years.” (*Id.* at p.
296.) The court held that defendant’s Sixth Amendment confrontation rights were not violated when
the court denied his motion to produce these materials because, “[t]he confrontation clause of the
Sixth Amendment did not entitle defendant to the vast array of materials he requested before and at
trial.” (*Id.*, at p. 298-299.) The court did not hold that defendant is not entitled to any of the
requested materials. The court merely held that the trial court did not abuse its discretion in denying
this defendant’s request because it was “too broad and burdensome.”


1 Here, defendant has tailored his request to comport with the elements that the prosecution
2 must prove under the statute. This court should compel disclosure.

3 Dated: December 17, 2009

Respectfully submitted,

4
5 HAYES H. GABLE, III
6 THOMAS A. PURTELL

7 By:


8 HAYES H. GABLE, III
9 Attorneys for Defendant
10 MARCO ANTONIO TOPETE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 430 Third Street, Woodland, CA 95695

On the date below, I served the following document(s):

**SUPPLEMENTAL POINTS AND AUTHORITIES IN
SUPPORT OF PRETRIAL DISCOVERY COMPLIANCE
MOTION**

☐ BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at Sacramento, California addressed as follows:

☒ BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the offices of the person(s) listed below:

JEFF REISIG
GARRET HAMILTON
Yolo County District Attorney
301 Second Street
Woodland, CA 95695

☐ BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the person(s) listed below:

☐ BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an attachment to the person(s) listed below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 2009, at Woodland, California.



THOMAS A. PURTELL